APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 18,168

Archie J. Layton, Isaac A. Byrd, James W. Brown, and Joseph R. Ainley, In Behalf of Themselves and as a Committee for and in Behalf of All Other Persons of a Class Similarly Situated,
Appellants,

vs.

Selb Manufacturing Company, a Division of Western, Inc., a Corporation, and Blades Manufacturing Corporation, a Corporation, International Association of Machinists, District 9,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 2, 1966.]

Before Vogel, Chief Judge, Blackmun, Circuit Judge, and Stephenson, District Judge.

Stephenson, District Judge.

This is an appeal from the District Court's order[1] denying appellants' motion[2] seeking to enforce a previous

[1] **Layton v. Selb Mfg. Co.**, 244 F. Supp. 178 (E. D. Mo. 1965).

[2] The appellants' motion was made pursuant to the provision of Federal Rules of Civil Procedure 60 (b) (6) which provides: "On motion and upon such terms as are just the court may relieve a party or his legal representative from a final order,

judgment which had been set aside and the cause therein dismissed by the District Court upon stipulation of the parties after said judgment had been affirmed by this Court.

An arbitration award ordering Selb Manufacturing Company and Blades Manufacturing Corporation (hereinafter referred to as Appellee-Company) to rehire certain employees, to make these employees whole financially, and to return certain equipment and work to St. Louis was obtained on January 5, 1961, by the International Association of Machinists, District No. 9 (hereinafter referred to as Appellee-Union). On February 10, 1961, the Appellee-Union and the Appellee-Company entered into a stipulation providing for the procedure to be followed if and when the Federal District Court ordered specific enforcement of the arbitration award.[3]

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judgment or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this sub-division (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

[3] The stipulation on subsequent procedure entered into by the Appellee-Union and the Appellee-Company was as follows:

"In the event the Court enters its order decreeing specific performance of the Arbitration Award then, and in the event that no appeal is taken, the parties shall attempt to reach agreement on what specifically the defendants must do in order to comply with the aforesaid Arbitration Award. In the event that the parties are unable to reach agreement within thirty days after expiration of the period permitted for appeal, or such additional time as the parties may agree upon, then on

The United States District Court for the Eastern District of Missouri entered an order on December 27, 1961, compelling specific performance of the arbitration award and further noted that "this Court will retain jurisdiction of this cause for the purpose of carrying out the Stipulation on Subsequent Procedure filed by the parties herein." The judgment of the District Court was affirmed on July 6, 1962. **Selb Mfg. Co. v. International Ass'n of Machinists**, 305 F. 2d 177 (8th Cir. 1962). In affirming the District Court's judgment this Court, after observing that a stipulation between the parties had been filed, noted that, if necessary, the District Court could deal with any controversies concerning the stipulation of the parties relating to implementation of the award. After this Court issued its mandate on August 29, 1962, settlement negotiations between the Appellee-Union and Appellee-Company resulted in a $125,000 payment to the Union in satisfaction of the Union claims and demands giving rise to the arbitration award.[4] The document embodying this agreement included a paragraph stating that "the Company will take whatever steps are necessary to withdraw further prosecution of its appeal and application for certiorari, and the Union will dismiss with prejudice at the cost of the Company Cause No. 61 C 20 (1) now pending in the

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application by either party the Court shall appoint a commissioner to implement compliance with the Award.

In the event that either party hereto appeals the finding and order of this Court and/or any appellate court with respect to whether or not defendants must comply with the arbitration award, the further steps mentioned above shall be held in abeyance pending disposition of said appellate procedure. If it is finally determined, on appeal, that defendants must comply, then the aforesaid procedure shall be followed."

[4] After discussion and action taken at two union meetings, Appellee-Union made distribution of the settlement to its members, including named appellants, who received and endorsed individual checks acknowledging full and complete settlement and satisfaction of their respective claims and a release of appellees. 244 F. Supp. at 179-80.

District Court of the Eastern Judicial District of Missouri." A stipulation by the parties setting aside the District Court's judgment of December 27, 1961, and dismissing the cause involved therein with prejudice to the plaintiff was filed and granted by the District Court on October 11, 1962. Thereafter, on March 15, 1965, the appellants herein, who have been designated as the Chief Shop Steward and a majority of the duly elected Shop Stewards of the employees of the Appellee-Company[5] filed a motion pursuant to Federal Rule of Civil Procedure 60 (b) (6) and sought, inter alia, to set aside the stipulation of October 11, 1962, and to secure the appointment of a Commissioner to enforce the original District Court judgment which was affirmed by this Court on July 6, 1962. The appellants' request for relief was denied by the District Court.

The sole ground relied upon by the appellants for reversal in this appeal is that the District Court erred in allowing a judgment which had been affirmed by an issued mandate of the Court of Appeals to be set aside and the cause of action dismissed without the permission or approval of the appellate court. The appellants have cited two cases in support of their position—**Hartman v. Lauchli,** 304 F. 2d 431 (8th Cir. 1962) and **Thornton v. Carter,** 109 F. 2d 316 (8th Cir. 1940).

While it is true that the cases cited by the appellants support the proposition that a District Court does not have the authority to alter or deviate from a mandate of the Court of Appeals without first obtaining the appel-

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[5] The appellants assert that their right to bring this action derives from Federal Rule of Civil Procedure 71 which provides that "when an order is made in favor of a person who is not a party to the action he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."

late court's consent, the legal principle involved has no application whatsoever to the facts of this case. As previously mentioned in the chronological description of the events which eventually culminated in the instant appeal, this Court specifically noted that the District Court retained jurisdiction of the case for the purpose of carrying out the Stipulation of Subsequent Procedure filed by the parties. After remand of the case, the Appellee-Union and the Appellee-Company entered into a settlement agreement. The fact that the District Court then, upon the request of the parties to the action, dismissed the cause of action with prejudice to the plaintiff in no manner disturbed the mandate of this Court. It is obvious that in affirming the District Court's judgment, this Court recognized the possibility of such a settlement when it stated that "any controversy over backpay allowances can, **if necessary**, be dealt with by the District Court in accordance with the stipulation of the parties relating to implementation of the award." **Selb Mfg. Co. v. International Ass'n of Machinists**, *supra* at 179 (emphasis added). It is abundantly clear that the District Court in approving the stipulation dismissing the case acted in conformance with the mandate of this Court. The appeal herein is wholly without merit.

Both appellees herein assert that the appellants' appeal is frivolous and ask for damages and costs pursuant to 28 U.S.C. § 1912. The Court agrees that the facts of this case render the instant appeal frivolous and that damages should be assessed.[6] Any costs the appellees incurred in connection with the printing of the Record or

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[6] See, **Lowe v. Willacy**, 239 F. 2d 179 (9th Cir. 1956); **Ginsburg v. Stern**, 295 F. 2d 698 (3d Cir. 1961); **Occidental Life Ins. Co. v. Eiler**, 126 F. 2d 429 (8th Cir. 1942); Compare **Honebein v. McDonald**, 299 F. 2d 493, 496 (8th Cir. 1962); **Hawkeye-Security Ins. Co. v. Davis**, 277 F. 2d 765, 772 (8th Cir. 1960); **Massachusetts Bonding & Ins. Co. v. Feutz**, 182 F. 2d 752, 758-59 (8th Cir. 1950).

the Joint Supplemental Record and the cost of printing appellees' briefs which were necessitated by this appeal are hereby assessed against the appellants. These amounts are to be shown by appellees' affidavits filed with the Clerk of this Court. In addition, appellee-company and appellee-union are awarded $500 each for counsel fees incurred in the appeal. The judgment of the District Court is affirmed and the Clerk of this Court is directed to enter the award of damages upon the showing of appellees' affidavits.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

PETITION FOR REHEARING OF ORDER

FILED
DEC 1 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 469.

ARCHIE J. LAYTON, ISAAC A. BYRD, JAMES W. BROWN and JOSEPH R. AINLEY, in Behalf of Themselves and a Committee for and in Behalf of All Other Persons of a Class Similarly Situated,
Petitioners,

vs.

SELB MANUFACTURING COMPANY, a Division of Western, Inc., a Corporation, and BLADES MANUFACTURING CORPORATION, a Corporation, and INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT NO. 9, a Labor Organization, Appellees,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The petitioners herein (the Chief Shop Steward and a majority of the Shop Stewards of an employee unit of the respondent Company) pray this Court to grant a rehearing of its order of November 7th, 1966, denying these petitioners a writ of certiorari, 87 S. Ct. ... (1966), and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit as prayed in the petition for certiorari filed herein on August 23rd, 1966.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. Chief Judge Vogel and Judges Blackmun and Stephenson (District Judge), in an opinion by District Judge Stephenson found the appeal herein to be frivolous and assessed damages against these petitioners which will approximate $2,000.00 (Appendix "A" to Petition for Writ of Certiorari, opinion of Eighth Circuit Court of Appeals, pages 5, 6 and 7).

2. An order and money judgment of this nature, without notice, without a hearing, without any indication that the district judge below found the original Rule 60 (b) (6) motion to be devoid of merit; and, finally without any clue or comment hinting at such an attitude from the Court of Appeals in the course of the argument of counsel during the submission of the appeal to the three Judges assigned to hear this appeal is a flagrant denial of the right of due process guaranteed by the Fifth Amendment to the Constitution of the United States.

3. The petition of these Union Shop Stewards under the provisions of Rule 60 (b) (6) (R. 6 to 9) prayed that the "Stipulation" of dismissal (R. 10) be set aside because this dismissal was violative of the mandate of the Eighth Circuit Court of Appeals (Prayer of petition, R. 8 and 9). Petitioners urge this Court to consider that this abortive "Stipulation" (R. 10), set aside the "judgment and decree entered by" the District Court "on December 27, 1961." The stipulation never mentions or even alludes to the fact that the Court of Appeals had entered its Mandate in that same file on August 30th, 1962, (Docket entries, U. S. District Court, R. 3). This Mandate and its affirming provisions, orders and judgments were never "set aside" and remain as binding and enforceable today as it was on August 30th, 1962. These petitioners need the authority of this Court "upon such terms as are

just" (Rule 60 (b) (6)) to allow them to enjoy the benefits of their arbitration award.

4. Rule 60 (b) (6) allows a District Court "to set aside a judgment for fraud upon the court." Underneath the mountain of abuse which has been shovelled onto these petitioners one fact remains crystal clear and uncontroverted: these union members were never advised in any respect of the terms and provisions of the "agreement" (J. S. R. 35, 36, 37, 38 and 39) entered into and executed by the respondent Union official and Company official on the same day that they executed and filed the abortive "Stipulation." This agreement was **never** filed with either the District Court or the Court of Appeals nor was it ever made known to these petitioners until **after** they filed their Rule 60 (b) (6) motion (R. 67, 70, 72). This "Agreement" re-wrote the Arbitrator's Award without his knowledge or consent; re-wrote the orders and judgment of the District Court Judge without his knowledge or consent; re-wrote the Mandate of the Court of Appeals without its knowledge or consent and finally it re-wrote the rights and benefits awarded to these petitioners without their knowledge or consent. **This is fraud!!!** Fraud upon an Arbitrator, two Courts and upon the rights of the employee-union members in whose behalf this entire proceeding was instituted. It is fraud by a labor union official in breach of his fiduciary duty to his captive members.

In the course of adjudicating this Rule 60 (b) (6) motion thus far this unassailable fact of fraud has never been mentioned. In retrospect it becomes the single most important factor in this entire case. Petitioners pray now that this Court re-consider its order refusing to issue its Writ of Certiorari, and correct the repeated denial of justice which has been the lot of these petitioners thus far.

CONCLUSION.

For the reasons set forth herein and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such re-hearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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JEROME J. DUFF,
Counsel for Petitioners.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Jerome J. Duff,
Counsel for Petitioners.

Certificate of Service.

State of Missouri,
City of St. Louis. } ss.

I, Jerome J. Duff, of counsel for the Petitioners herein and attorney of record for the Petitioners in the Court below, depose that on the 30 day of November, 1966, I served four copies of the foregoing Petition for Rehearing on the Respondents as required by Rule 33, Paragraph 1, by personally mailing said copies hereof to Mr. Bernard Barken, Attorney of Record for Respondent Company,

611 Olive Street, St. Louis, Missouri 63101, and Messrs. Bartley, Siegel and Bartley, Attorneys for Respondent Union, 130 South Bemiston Avenue, Clayton, Missouri 63105.

.....

Jerome J. Duff.

Subscribed and sworn to before me at St. Louis, Missouri, on this .... day of November, 1960.

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Notary Public.

My Commission Expires:

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